

TOLLING AGREEMENT

This Tolling Agreement (the “Agreement”) is made and effective this 21st day of June, 2023 by and between Ouray County, Colorado (“County”), Charles Cunniffe Architects, P.C. (“CCA”), and FCI Constructors, Inc. (“FCI”), collectively referred to as the “Parties.”

The following describes the intent and purpose of this Agreement:

- a. This Tolling Agreement is made with respect to the Ouray County Courthouse Renovation and Addition Project , 541 4th Street, Ouray, Colorado 81427 (the “Project”), specifically with respect to certain heating, ventilation, and air conditioning (“HVAC”) upgrades undertaken as part of the Project.
- b. The County contracted with CCA and FCI to perform design and construction services, respectively, in connection with the Project. On March 24, 2022, FCI sent a letter to the County notifying of the “Final Completion” of the Project, as defined by the contract documents.
- c. Concurrently, the County has identified certain problems with the functioning of the HVAC system, and some or all of the Parties have conferred about the origin of these problems.
- d. The County, at its sole expense, at significant costs to the County of approximately \$68,600.00, has engaged a qualified mechanical forensic engineer, B2CE, Inc., including qualified electrical sub-consultant(s), to evaluate the functioning of the system and the origin of any problems.
- e. The Parties acknowledge that there may be substantial unknowns as to the existence, nature, or origin of defects that may affect the HVAC system; they wish to work together cooperatively to resolve any such problems prior to resorting to legal proceedings for the sake of efficiency, cost-saving measures, and timely final close-out of the Project.
- f. The Parties further acknowledge that the diagnosis of any problem with the functioning of the HVAC system is a matter that requires specialized technical investigation.

1. Covenant Not to Sue. In consideration of the mutual performances described below, the Parties agree as follows. The Parties agree that the County will not commence a legal action to sue or invoke any other dispute resolution mechanisms (other than those specified in this Agreement) with respect to the Project HVAC system during the pendency of this Agreement, unless a Catastrophic Event occurs during the pendency of this Agreement. For purposes of this paragraph, a “Catastrophic Event” means an HVAC failure that results in over \$50,000.00 in property damage or other liabilities to the County, as determined in the County’s reasonable exercise of discretion.

2. Information Sharing. The Parties agree to cooperate in the sharing of information concerning the functioning of the HVAC system, including oral or written consultations as needed with all Parties and their sub-consultants and/or subcontractors. Additionally, the County agrees to share with the other Parties a complete copy of the final third-party forensic report prepared by B2CE (the Forensic Report). The Forensic Report shall be transmitted promptly to the other Parties following its receipt by the County in its final written form.

3. Tolling of Statutes of Limitation as to Claims and Defenses. All statutes of limitation that apply or may apply to any legal or other claims by the County against the other Parties and pertaining to the Project HVAC system shall be tolled and stayed during the pendency of this Agreement from its effective date, above, until its expiration. In any action or proceeding between the parties concerning the Project, any time-related or time-sensitive defenses of the statute of limitations, statute of repose, doctrine of laches and/or any similar rule of law or equity (“Time Based Defenses”) shall be tolled as of the date of this Agreement. The running of any Time-Based Defenses which are or may be applicable to any of County’s claims shall be deemed to re-commence upon the expiration of this Agreement, as set forth in paragraph 7, below.

4. Discovery Date. It is agreed that the date of the Forensic Report shall be the “discovery date” for purposes of the County identifying the existence of any defects in workmanship, design, materials, functionality, or the like as may be applicable to the Project HVAC system.

5. Agreement to Pursue Good-Faith Resolution. Prior to resorting to litigation, the Parties agree to continue to pursue good-faith resolution of any issues identified by the Forensic Report, and to confer about final close-out of the Project, including any claims that may be disclosed or identified in the Forensic Report. These efforts may include in-person meetings, informal negotiation, or mediation between a mutually acceptable neutral. If mediation is employed, the costs will be paid equally by all Parties. The Parties agree to promptly schedule and attend (by videoconference or otherwise) an initial informal resolution kick-off meeting, following their receipt of the Forensic Report, in order to attempt to: (1) confer about final close-out; (2) work to together to prepare any type of informal punch-list of any items necessary for final close-out, to be completed based on the results of the Forensic Report; and (3) work together to attempt to agree on any appropriate cost-sharing or any punch-list items that are the financial responsibilities of individual Parties.

6. No Admission of Fault. This Agreement shall not be construed to be an admission of fault, wrong-doing, or liability with respect to any of the subjects described herein. Additionally, the Parties are not bound by, and shall not be deemed to agree with any findings, conclusions, or recommendations contained in the Forensic Report.

7. Term of Agreement. This Agreement shall commence on the date specified in the first paragraph above and shall terminate sixty (60) days from the date of the final Forensic Report, but the discovery date provision, good-faith resolution provision, and no admission of fault provision (paragraphs 4 through 6, above), shall survive termination of this Agreement.

8. Notices. Any notices under this Agreement shall be given by email to the following addresses:

a. If to the County:

Leo Caselli, County Attorney & Connie Hunt, County Administrator
lcaselli@ouraycountyco.gov & chunt@ouraycountyco.gov

b. If to CCA:

Charles Cunniffe, Architect
charles@cunniffe.com

c. If to FCI:

Matt Aupperle, Project Manager
MAupperle@fciol.com

9. Counterparts; Electronic Signature. This Agreement may be executed in separate identical counterparts, all of which together shall constitute a binding contract. The Parties agree to accept signatures via email transmission, docu-sign, or similar electronic means, with copies having the same binding effect as original documents.

10. Authority. All Parties acknowledge and state that this is a valid, binding, and enforceable obligation executed after obtaining all necessary authority.

11. Governing Law. This Agreement is governed by Colorado law, and there is no waiver of governmental immunity. The mandatory and exclusive venue for any legal disputes arising under this Agreement is the Seventh Judicial District, State of Colorado.

THIS AGREEMENT is made and effective as the date specified above.

BOARD OF COUNTY COMMISSIONERS
OF THE COUNTY OF OURAY, COLORADO

By: _____

Jake Niece, Chair

ATTEST:

By: _____

Harlan Thompson, Deputy Clerk of the Board

Tolling Agreement, Ouray County Courthouse Renovation and Addition Project,
Signature Page

CCA:

By: *Chris*

FCI:

By: *Matt Appelle*

-End of Document-